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**IN THE  
SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1945.**

**No. 285.**

**DAVID E. COOL,  
Petitioner,**

**v.**

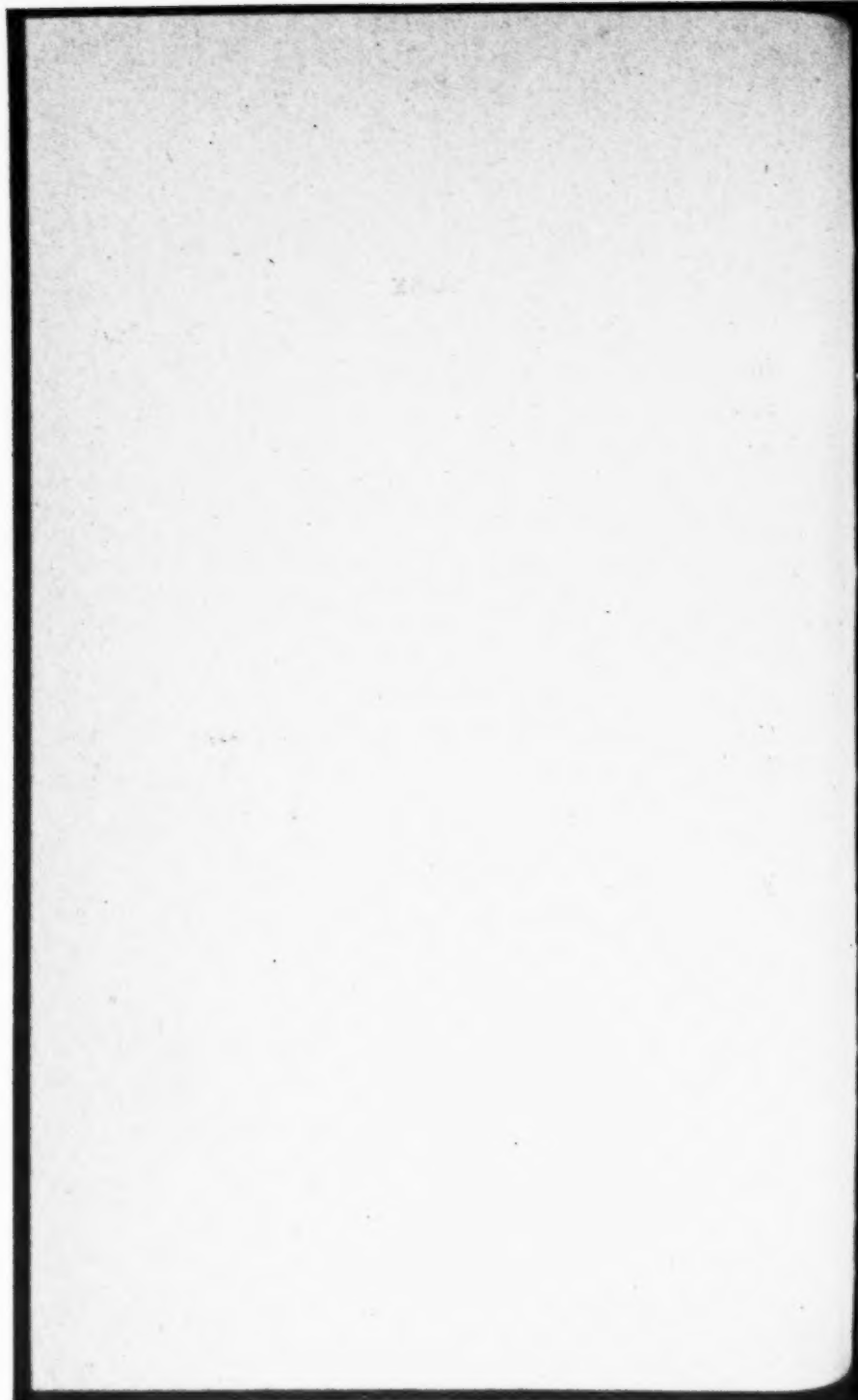
**INTERNATIONAL SHOE COMPANY, a Corporation,  
Respondent.**

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI.**

✓ **LAWRENCE C. KINGSLAND,  
Counsel for Respondent.**

**Of Counsel:**

**DANIEL BARTLETT,  
RICHARD O. RUMER,  
KINGSLAND, ROGERS & EZELL.**



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**Response to Summary Statement.**

The statement of matters involved, while properly subject to challenge from a factual standpoint, for the most part requires no comment, because the major portion of the statement deals with matters entirely irrelevant to the questions presented by this petition.

The statement embodies largely an argumentative recitation of matters dealing with merits of the case which have no relevancy to any ground asserted in support of the petition. The first four full pages of the statement relate

merely to petitioner's interpretation of his asserted cause of action, and to alleged trial errors of the District Court.\*

At the close of plaintiff's (petitioner's) case, the District Court, in response to a motion for an instructed verdict then filed by the defendant (respondent here), and argued and submitted (R. p. 327), indicated its intention to sustain the motion, thus evidencing its opinion and conclusion that plaintiff's action was without merit. But the District Court, nevertheless, upon a motion of plaintiff made thereafter and which did not set out any specific grounds upon which it was based, permitted plaintiff to withdraw from the contest without prejudice. It was this action of the District Court that the Circuit Court of Appeals reversed, not because the Circuit Court of Appeals in any wise misinterpreted Rule 41, but because that Court found that, upon the record as made in the District Court, the District Court's action was improper. It held that the District Court had abused its discretion in granting the order of dismissal without prejudice.

It, therefore, seems apparent that there is no reason why this Court should grant the Writ. The Circuit Court of Appeals merely decided a point of fact under undisputed and recognized principles of law.

### **Single Question Presented.**

The single question presented by the petition (p. 9) is the construction of Rule 41 of the Rules of Federal Procedure, which petitioner contends requires interpretation by this Court upon the assertion that the rule was misconstrued and misapplied by the Circuit Court of Appeals.

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\* The Circuit Court of Appeals properly held that these matters were irrelevant on the question of the propriety of the order of dismissal. The Court said (R. pp. 341, 342):

"Plaintiff argues at great length that the trial court had committed error in the course of the trial and for that reason the granting of his motion was proper. The right of appeal, however, existed and if error was committed that would not be a valid reason for granting a motion for dismissal without prejudice. It is also argued that plaintiff was taken by surprise by certain rulings of the court during the trial. There was, however, no motion for continuance but the case was submitted on the merits of defendant's motion for a directed verdict. \* \* \*"

## **ARGUMENT.**

### **Petitioner's Point A.**

Petitioner's asserted reason for attack upon the decision below under point A. 1. (p. 9) is that it nullifies the provision of Rule 41 (b) giving the trial court discretion to allow a plaintiff to dismiss his case without prejudice. However, there is no such question in this case. Certainly, under some circumstances, a trial court is vested with discretion to permit a party to dismiss an action without prejudice under Rule 41 (b). This the decision below clearly recognizes.

The only dispute that petitioner actually has is whether or not the individual circumstances of this particular case manifested an abuse of that discretionary power. This dispute involves no general interpretation of the Federal Rules. Whether this set of individual conditions constituted an abuse of that discretion does not seem to present the type of public question justifying the grant of the writ.

The Circuit Court of Appeals recognized its power to determine whether or not the District Court providently exercised a judicial discretion in passing the order of dismissal without prejudice.\*

Whether or not judicial discretion has been exercised must necessarily involve a factual examination of the circumstances of the particular case. The Court below, although recognizing the right of a party to dismissal without prejudice as a substantial one, quite conventionally held that, if legal prejudice beyond the onus of further litigation as a matter of fact exists, then the right

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\* The Court said (R. p. 340):

"At most, the discretion vested in the Court is a judicial and not an arbitrary one and does not warrant a disregard of well settled principles of procedure. \* \* \*

to dismiss without prejudice was one that could be defeated by such circumstances.†

The decision below examined the facts and circumstances of the case, and, on the record, under application of general principles entirely apart from the construction of the Federal Rules, found as a fact that there were no grounds properly invoking the trial court's discretion to permit a dismissal of the action without prejudice.

The decision evidences the fact that the Circuit Court of Appeals took into consideration that the action had been pending for nine years; that the plaintiff had filed three amended complaints; that plaintiff had ample opportunity to prepare the case for trial; that the plaintiff had consumed four and one-half days in presenting his case; that plaintiff had rested his case; that defendant's motion for a directed verdict had been fully presented on its merits and submitted to the Court, and that Court had announced its intention to sustain the motion and direct a verdict for defendant; and that the record disclosed no specific grounds as a basis of plaintiff's application for permission to dismiss without prejudice.

Therefore, the Circuit Court of Appeals considered the case as one involving circumstances under which the plaintiff could not providently be permitted to withdraw without prejudice, and that the discontinuance of the case, under such circumstances, imposed an onus on the defendant beyond the mere annoyance and expense of a second litigation. Upon finding such to be the fact, and with a record barren of any showing of grounds which would invoke the exercise of judicial discretion, that Court found that the District Court had abused its discretion in permitting the dismissal without prejudice to plaintiff.

† The Court said (R. p. 340):

" \* \* \* Although the right to dismiss without prejudice was deemed to be a substantial one, it could be defeated if some plain legal prejudice would result to defendant other than the mere necessity or prospect of a second litigation upon the same subject. \* \* \* "



Therefore, since there is no question as to the construction of the Rule, asserted to have been misapplied by the Court below, but only the question of fact as to whether the circumstances disclosed by the record justified any action other than a dismissal on the merits, what is presented to this Court is an application to review and to revise a fact finding by the Circuit Court of Appeals. Such a question is one, we respectfully submit, that should not invoke a review by this Court.

As to the secondary reason assigned under petitioner's point A. 2. (p. 9), alleging that the decision below conflicts with decisions of other circuits, since the major premise is lacking, namely, that the decision below misconstrued the rule, there can be no basis for the contention that there is conflict of decision. True it is that, prior to the adoption of Federal Rules of Civil Procedure, the practice with respect to dismissal presented conflict of decision between the several Federal Courts; but this was only because the Federal Courts were bound under the Conformity Act to follow the varied state practices. There was, therefore, no established uniform practice.\*

Since the Rules of Civil Procedure supersede the Conformity Act and the common law, obviously decisions prior to the adoption of the new Federal Rules have no current relevance, and the authority upon which petitioner relies for support of its contention under this subdivision of its petition requires no comment.

In respect to the comments of former Attorney General William D. Mitchell, as an aid to interpretation of the Rule in question (regardless of whether or not such comments, which are certainly not part of the legislative history of the Rules, may be considered), on analysis, these comments appear to be in entire harmony with the

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\* Compare *Colon v. Clyde Steamship Co.*, 52 F. (2d) 845, 846, and *Pannill v. Roanoke Times Co.*, 252 Fed. 910, 915, with cases cited by petitioner.

construction given that Rule by the decision below.† The comments of General Mitchell merely recognize that the trial court has discretion to dismiss without prejudice before the actual giving of a directed verdict, but they do not touch upon the question in the present case of whether particular circumstances justify the exercise of that discretion.

### **Petitioner's Point B.**

Petitioner recognizes that it was legally within the province of the Court below to consider whether the order of dismissal of the trial court was providently granted. It is obviously not true that the Circuit Court of Appeals considered the merits of the case beyond the extent necessary to determine the single issue as to whether the trial court had properly exercised a judicial discretion. Certainly, the issue of the proper exercise of discretion involves a consideration of the circumstances of the particular case.

The Court, having considered the circumstances bearing on this issue and having found as a fact that the respondent had suffered more than the mere onus of a second litigation, properly, under established law, reversed the District Court. The authority that is cited under this point by the petitioner, therefore, has no relevancy.

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† In comparing the effect of Rule 41 (b) and Rule 50 (a), General Mitchell recognized that the former rule authorized the Court, in the exercise of a judicial discretion, to permit a dismissal with or without prejudice, but that where, as here, a motion is made for an instructed verdict by defendant, at the conclusion of plaintiff's evidence, the Court has either to deny or grant the motion. The inference from these comments is that a motion for voluntary dismissal by plaintiff comes too late after defendant has moved for an instructed verdict and the Court has announced its intention to sustain the motion.

**Petitioner's Points C and D.**

Since these points go entirely into fact questions outside of interpretation of the Rule, and are involved in the discussion with respect to the preceding points, no comment is necessary.

**Petitioner's Point E.**

This point merely raises an incidental issue which was obviously treated as such by the decision below and no comment is necessary for the reason that it cannot and does not constitute any valid reason in support of the petition for the Writ.

**Conclusion.**

Since the Court below recognized that the trial court had discretionary power to grant or deny a voluntary dismissal, there is no question before this Court on the point. All agree that such power exists.

Since the decision of the Court below recognized that the right to oppose voluntary dismissal requires something more than the prospect of a second litigation, there is no question before this Court on the point. All agree that such is the law.

What the Court below found was that under the foregoing principles the respondent here was prejudiced beyond the prospect of second litigation. The only thing that this Court could decide upon, if certiorari were granted, is whether or not certain individual facts, peculiar to this case, constituted such prejudice and, therefore, made the action of the District Court an abuse of discretion.

Respondent contends that the facts abundantly support the decision of the Circuit Court of Appeals. But respondent further suggests that for this Court to review or even

reverse the Court of Appeals would merely adjudge what facts constitute legal prejudice, and not afford any general illumination on practice under the Rules of Civil Procedure.

Respectfully submitted,

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St. Louis, Missouri,  
August 10, 1946.

